IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21/07/2003

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

C.A.No.1804 of 2002

Mariappan @ Muthu .. Appellant

-Vs-

State by:
Inspector of Police
Vellianaai Police Station
Karur District .. Respondent

This criminal appeal is preferred under Sec.374(2) of The Code of Criminal Procedure against the judgment of conviction and sentence passed by the Assistant Sessions Judge, Karur, made in S.C.No.136 of 1994 and dated 13.11.2002.

!For Appellant : Mr.S.Govindarajan

^For Respondent : Mr.V.Jaya Prakash Narayanan
Government Advocate (Crl. Side)
:JUDGMENT

The appellant/accused, who stood charged, tried and found guilty under Ss 395 and 397 of I.P.C. and sentenced to 10 years R.I. each has brought forth this appeal. Since the other accused were absconding, the case was split up and was committed to the Court of Sessions only in respect of the appellant.

2. The short facts necessary for the disposal of this appeal can be stated as follows:

(a) P.W.1 Nagulsamy was living with his wife P.W.2 Arukkani and his daughter P.W.3 Thamizharasi in Kathavadi Village, Karur District. On 10.12.1990 at witch hour, when P.Ws.1 to 3 were sleeping, the doors of the house were knocked by the accused. When P.W.1 opened the doors, the appellant along with seven others namely Solan @ Murugan, Karuppasamy @ Karuppu, Siva @ Sivan, Verran, Rajenderan, Chandiran and Malaichami armed with deadly weapons made illegal entry into the house with the common intention of committing dacoity and locked the door from inside. The appellant wielded his knife against P.W.1 on his left hand, while all other assailants were threatening the witnesses with knife. They looted gold jewels namely M.Os.1 to 4 worth about Rs.1 6,000/- and a cash of Rs.100/- and fled away from the site of occurrence. P.Ws.2 and 3 have also witnessed the occurrence. P.W.1 proceeded to Velliyanai Police Station and lodged Ex.P1 complaint to P.W.8

Vijayasekaran, Sub Inspector of Police (Crimes), who on the basis of Ex.P1 registered a case in Crime No.420/90 under Ss 457 and 395 of I. P.C. Ex.P8 printed F.I.R. was despatched to the concerned Judicial Magistrate's Court, while the copies were sent to the higher officials. P.W.1 was sent to the Government Hospital, Karur with a medical memo for treatment. P.W.7 Dr.P.Arumugam attached to the Government Hospital, Karur treated P.W.1 on 11.12.1990 at 9.00 A.M. and issued Ex.P7 wound certificate. P.W.10 Panneerselvam, Inspector of Police, Karur Taluk Police Station, on receipt of the copy of the F.I.R., took up the investigation, proceeded to the site of occurrence and prepared Ex.P11 observation mahazar in the presence of the witnesses and Ex.P12 rough sketch. The Investigating Officer examined P.Ws.1 to 4 and recorded their statements and informed the same to finger print experts and sniffer dog wing to inspect the occurrence place.

(b) P.W.11 K.Thiagarajan, Inspector of Police, Udumalaipet (Crimes) while investigating the cases in Crime Nos.7/91 and 9/90, on 9.4.199 1 arrested the absconded accused namely Chandiran and Rajendiran and recorded their confessional statements and on the basis of the confessions, he made recoveries. On 20.4.1991 at about 7.45 P.M., P.W.11 arrested the appellant along with the absconded accused namely Siva @ Sivam and Karuppu @ Karuppasamy in Crime No.420/90 and recorded their confessional statements in front of P.W.5 and one Rajendran. The admissible portion of the confessional statement made by the appellant is marked as Ex.P13. Pursuant to the said confession, the accused took P.W.11 to Madurai, where M.O.1. gold necklace, M.O.2 (series) 3 gold rings, M.O.3 (series) gold bangles and M.O.4 (series) gold studs were recovered from P.W.6 Ramesh, a Jeweller under Ex.P14 mahazar. The accused were sent for remand. On 25.4.1991 P.Ws.1 to 3 identified their properties at Udumalaipet Police Station to P.W.11. P.W.11 examined P.Ws.1 to 3 and recorded their statements. Thereafter, on 20.5 .1991, the Investigating Officer took the custody of the appellant and other accused for interrogation in respect of the other cases. P. W.11 made a request for conducting test identification parade in respect of the appellant and other accused before the concerned Court. P.W.9 Mr.Thangakani, Judicial Magistrate No.II, Karur conducted test identification parade in respect of the appellant and the other absconded accused on 10.5.1991 at Central Prison, Tiruchy and prepared Ex.P9 identification parade report. P.W.12 T.M.Ambigapathy, Inspector of Police (Crimes), Karur Taluk Police Station took up further investigation, verified the records, examined the witnesses, recorded their statements, received the case properties from P.W.11 and produced before the Judicial Magistrate No.I, Karur. On completion of the investigation, he filed a charge sheet against the appellant and other accused on 30.8.1991. Since the other accused who were arrested absconded, the case was split up and the appellant was committed to the Court of Sessions for the conduct of the trial.

3. In order to prove the charges levelled against the accused, the prosecution examined 12 witnesses and marked 16 exhibits and 4 material objects. After the completion of the evidence on the side of the prosecution, the accused was questioned under S.313 of Cr.P.C. as to the incriminating circumstances found in the evidence of the prosecution witnesses, and the accused flatly denied the same as false. No defence witness was examined. On consideration of the rival submissions and scrutiny of the available materials, the trial Court found the appellant/accused guilty under Ss 395 and 397 of I.P.C. and sentenced him to undergo the imprisonment, as stated supra.

4. Advancing his arguments for the appellant, the learned Counsel made the following submissions for consideration by this Court: There were vital discrepancies in the evidence of the eyewitnesses namely P.Ws.1 to 3 regarding the year of occurrence, the manner in which the occurrence had taken place and the number of assailants, and thus, the evidence of the so-called eyewitnesses was not trustworthy at all and ought to have been rejected by the trial Court. The lower Court should have rejected the test identification parade, since it was not at all admissible in evidence as the eyewitnesses P.Ws.1 to 3 have categorically admitted that after the arrest of the accused and before the identification parade was held, all of them were shown to the eyewitnesses at the Udumalpet Police Stati on and also later at Sub Jail, Karur. The arrest of the accused, the confession and recovery based on the confession are all not trustworthy and reliable, as the eyewitnesses and other witnesses differ on material particulars. The witnesses examined for the alleged confession and recovery namely P.Ws.5 and 6 both have turned hostile, and thus, their evidence was not available for the prosecution. Even then, the trial Court has relied on their evidence to record a conviction. P.W.4 a witness for the observation mahazar has also turned hostile, and thus, the lower Court without any evidence to prove the nexus between the appellant and the crime in question has found him guilty, and hence, he is entitled for an acquittal in respect of the charges levelled against him.

5. Strongly opposing the above contentions of the appellant's side, the learned Government Advocate (Criminal Side) would submit that P. Ws.1 to 3 have clearly narrated the occurrence and have identified the appellant also not only in the identification parade, but also in the Court, and thus, the involvement of the appellant in the said dacoity along with the others was clearly proved by the prosecution; that the properties namely jewels which were marked as M.Os.1 to 4, belonged to P.W.1 and the same was never disputed by the appellant, and those properties were recovered from P.W.6 a jeweller, pursuant to a confession given by the appellant/accused recorded in the presence of P.W.5 and another; that it is true that P.W.5 has turned hostile, and P.W.6 from whom the properties were recovered has also turned hostile, but those recoveries have been clearly proved by the prosecution through the evidence of the Investigating Officer, and hence, the prosecution has proved the nexus between the appellant and the crime in question, and therefore, the judgment of the lower Court has got to be sustained.

6. This Court paid its full attention on the available materials and the rival submissions made.

7. As seen above, the gist of the prosecution case was that when P. W.1 along with his wife and daughter examined as P.Ws.2 and 3 respectively was sleeping in his residence on 10.12.1990 at witch hour, the house doors were knocked; that when the doors were opened by P.W.1, the appellant/accused accompanied by 7 more assailants unlawfully trespassed into the house; that all the assailants including the appellant were armed with deadly weapons; that the appellant attacked P.W.1 with knife on his left hand, and under threat, the assailants looted Rs.16,000/- worth gold jewels and a cash of Rs.100/- and fled away from the scene of occurrence. In order to bring home the guilt of the accused, the prosecution much relied on the test identification parade conducted by P.W.9 Judicial Magistrate and the recovery of M.Os.1 to 4 from P.W.6 Jeweller pursuant to the confessional statement made

by the appellant/accused in the presence of P.W. 5 and other witness. Accepting the said evidence, the lower Court has recorded a conviction against the appellant. This Court is of the view that the evidence adduced by the prosecution both on the identity of the appellant/ accused and the recovery of the material objects, pursuant to the confessional statement alleged to have been given by the appellant cannot be accepted for more reasons than one.

8. The occurrence has taken place on 10.12.1990 at witch hour. The test identification parade on the requisition by the Investigating Officer was conducted on 10.5.1991. According to the Investigating Officer, the appellant along with others was arrested in connection with two other crime numbers namely 7/91 and 9/90 on the file of the Inspector of Police, Udumalpet, and on the arrest, the appellant made a confessional statement voluntarily in the presence of P.W.5 and one Rajendran. The only independent witness examined by the prosecution as to the confessional statement made by the appellant i.e. P.W.5 has turned hostile. While so, the prosecution should have examined the other witness in that regard. But, the prosecution has failed to do so. The prosecution has not even tendered any explanation why the other witness was not examined. According to the prosecution, pursuant to the said confession, the jewels were recovered from P.W.6 Jeweller at Madurai. The said witness has also turned hostile. M.Os.1 to 4 were marked by the prosecution stating that they were the subject matter of dacoity. But, P.W.1 has categorically admitted that he took the properties from the custody of the Court and has changed them, and thus, it would be abundantly clear that M.Os.1 to 4 which were shown to P.W.1 and marked at the time of trial, were not the subject matter of dacoity. Under the stated circumstances, no reliance could be placed either on the alleged confession or the recovery to connect the appellant/accused to the crime.

9. The prosecution has also relied on the test identification parade conducted by the Judicial Magistrate No.II, Karur. It is true that the said Judicial Magistrate has been examined as a witness. He has also deposed that the prosecution witnesses have identified this appellant along with the other accused. But, it remains to be stated that the test identification parade has taken place only on 10.5.1991 at the Central Jail, Tiruchy. It is pertinent to note that P.Ws.1 to 3 have categorically admitted that the accused were shown to them on 2 5.4.1991 at the Police Station, Udumalpet. Needless to say that even before the identification parade was conducted, the appellant was shown to the prosecution witnesses. In such circumstances, they could easily identify the accused at the time of the identification parade which took place subsequently, and hence, no evidentiary value could be attached to the test identification parade .

10. The lower Court without considering the above aspects of the matter has relied on both the alleged arrest and recovery and the test identification parade in order to record a conviction, which for the reasons stated above, cannot be accepted. Hence, the Court is of the firm view that it would be highly unsafe to base a conviction against the appellant/accused in the light of the above reasons. The judgment of the lower Court has got to be necessarily set aside, and the appellant/accused is entitled for an acquittal of the charges against him.

11. In the result, this criminal appeal is allowed, setting aside the judgment of conviction and sentence passed by the lower Court. The appellant/accused is acquitted of the charges levelled against him. The

appellant/accused is directed to be set at liberty forthwith, if he is not required in any other case.

Index: Yes
Internet: Yes

To:
1) The Assistant Sessions Judge, Karur.
2) The Principal Sessions Judge, Karur.
3) The Superintendent, Central Prison, Madurai.
4) The Public Prosecutor, High Court, Madras.
5) The D.I.G. of Police, Chennai 4.
6) Mr.V.Jaya Prakash Narayanan, Government Advocate (Crl. Side), High Court, Madras.
7) The Inspector of Police, Velliannai Police Station, Karur District.

nsv/